Supreme Court, U.S.
FILED
FEB 13 2004
OFFICE OF THE CLERK

(68)

02-1624

~~No. 02-1264~~

IN THE

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON,
Petitioners,

v.

MICHAEL A. NEWDOW,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF BARBARA A. MCGRAW IN SUPPORT OF AFFIRMANCE

Barbara A. McGraw
Counsel of Record
Saint Mary's College of California
1928 Saint Mary's Road
Moraga, California 94556

February 13, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

INTEREST OF *AMICUS CURIAE*..... 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT..... 1

ARGUMENT..... 3

I. THE AMERICAN POLITICAL SYSTEM HAS A RELIGIOUS GROUND, BUT IT IS NOT THE ONE PROFFERED BY THE UNITED STATES AND CERTAIN OF PETITIONERS' *AMICI*.....3

II. A FALSE RELIGIOUS/SECULAR DICHOTOMY IN THE BRIEFS OF THE UNITED STATES AND PETITIONERS' *AMICI* OBSCURES WHAT THE FOUNDERS REJECTED—TOP-DOWN GOVERNMENT DOMINATION..... 9

III. THE FOUNDERS EMBRACED PLURALISM, WHICH IS THE SHARED VALUE AND UNIFYING PRINCIPLE OF THE NATION.....13

A. The Breadth of the Words Used by the Founders to Reference the Divine Implies Inclusiveness.....14

B. The Historical Record Shows that the Founders and John Locke Before Them Embraced Pluralism.....16

C. The Majoritarianism of the United States and Petitioners' *Amici* is in Opposition to the Intentions of the Founders.....20

D. The Word "God" is Not Generic and Is Not a Shared Value or Unifying Concept.....21

E. Pluralism Is America's Shared Value Which, Unlike "Under God," is Consistent with the Moral Foundations of the Nation.....24

CONCLUSION.....28

TABLE OF AUTHORITIES

FEDERAL CASES

County of Allegheny v. ACLU, 492 U.S. 573 (1989).....24

Lynch v. Donnelly, 465 U.S. 668 (1984).....24

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).....10

Zorach v. Clauson, 343 U.S. 306, 314 (1952).....26

LEGISLATIVE MATERIALS

H.R. Rep. No. 1693, 83d Cong. 2d Sess. 2 (1954).....4

S. Rep. No. 1287, 93d Cong. 2d Sess. 2 (1954).....4, 5, 10

PRIMARY SOURCES

Samuel Adams, "The Rights of the Colonists and a List of Infringements and Violations of Rights" (1772) reprinted in The Bill of Rights: A Documentary History, ed.Bernard Schwartz (Chelsea House Publishers, 1971), 201 [cited as "*Documentary History*"].....6

Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution*, 2nd ed. (1836) [cited as "Elliot Debates".....16

Benjamin Franklin, "Toleration in Old and New England," The London Packet, 3 June 1772, *Benjamin Franklin Writings*, ed. J.A. Leo Lemay (The Library of America, 1987) [cited as "*Franklin Writings*"].....13

Benjamin Franklin, "To Ezra Stiles," 9 March 1790, *Franklin Writings*.....15

Benjamin Franklin, "Dialogue Between Two Presbyterians," 10 April 1735, *Franklin Writings*.....15

Thomas Jefferson, *Autobiography*, 1821, *The Complete Jefferson: Containing His Major Writings, Published and Unpublished, Except His Letters*, ed. Saul K. Padover (Duell, Sloan & Pearce, 1943) [cited as "*The Complete Jefferson*"].....18

Thomas Jefferson, "A Bill for Establishing Religious Freedom," submitted to the Virginia General Assembly 1779, enacted 1786, *The Complete Jefferson*.....6, 7, 11

Thomas Jefferson, "To a Committee of the Danbury Baptist Association," 1 January 1802, *The Writings of Thomas Jefferson*, Memorial Edition, ed. A.A. Lipscomb and Albert E. Bergh, 20 vols, vol. 16 (Washington, D.C., 1903-04) [cited as "*Jefferson Writings*"].....5, 25

Thomas Jefferson, "Notes on Religion," October 1776, *The Complete Jefferson*.....17

Thomas Jefferson, "Notes on the State of Virginia," 1781-1785," *The Complete Jefferson*.....6, 11, 15, 27

Richard Henry Lee, "To James Madison," 26 November 1784, *Madison Papers*, eds. William T. Hutchinson, et al. *The Papers of James Madison*, ser. in progress (Chicago, 1962-) vol. I [cited as "*Madison Papers*"].....19

Richard Henry Lee, "Observations Leading to a Fair Examination of the System of Government," Letter IV, 12 October 1777, *Letters from the Federal Farmer to the Republican*, ed. Walter Hartwell Bennett (University of Alabama Press, 1978) [cited as "Observations of Government"].....19

John Locke, *Of Civil Government, Two Treatises of Government*, *The Works of John Locke*, 9 vols., vol. IV (London 1824)[cited as "*Second Treatise*"].....14

John Locke, *Essay on Human Understanding, The Works of John Locke*, 9 vols., vol. II (London 1824).....14

John Locke, *A Letter Concerning Toleration*, trans. William Popple (1685, published 1689), *reprinted in, Political Writings of John Locke*, ed. David Wootton (Mentor, 1993) [cited as "*Letter Concerning Toleration*"].....5, 11, 16, 17, 24

James Madison, "To Thomas Jefferson," 17 October 1788, *The Writings of James Madison*, ed. Gaillard Hunt, 9 vols. (G.P. Putnam's Sons, 1900-1903), vol. 5 [cited as "*Madison Writings*"].....16, 20-21

James Madison, "To Thomas Jefferson," 24 October 1787, *Madison Writings*, vol. 5.....21

James Madison, "Memorial and Remonstrance against Religious Assessments" (1785), *Madison Writings*, vol. 2.....5, 6, 14, 25

James Madison, "Speeches in the First Congress, First Session," 8 June 1789, *Madison Writings*, vol. 5.....20

Matthew 7: 20-21, The Bible, New International Version.....22

George Washington, "Letter to the Hebrew Congregation in Newport, Rhode Island," August 18, 1790, *The Papers of George Washington*, Presidential Series, ed. Dorothy Twohig, et al., 7 vols., vol. 6 (University Press of Virginia, 1987-2000) [cited as *"Washington Papers"*].....5, 13, 18-19

SECONDARY SOURCES

Robert N. Bellah and Phillip E. Hammond *Varieties of Civil Religion* (HarperCollins, 1982).....12

Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 730 (1997).....29

Robert S. Ellwood and Barbara A. McGraw, *Many Peoples, Many Faiths: Women and Men in the World Religions* 7th ed.(Prentice-Hall, 2002) [cited as "*MPMF*"].....7, 22-23

James H. Hutson, *Religion and the Founding of the American Republic* (Library of Congress, 1998).....23-24

Michael W. McConnell, *Why is Religious Liberty, the "First Freedom"*? 21 Cardozo L. Rev. 1243 (2000).....29

Barbara A. McGraw, *Rediscovering America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America* (State University of New York Press, 2003)[cited as "*RASG*"].....*passim*

Edmund S. Morgan, *Benjamin Franklin* (Yale University Press, 2002).....15

Neilia Beth Scoville, *The Liberation of Women: Religious Sources* (Washington, DC: The Religious Consultation on Population, Reproductive Health and Ethics, 1995).....13

Wilfred Cantwell Smith, *The Meaning and End of Religion* (1962; Fortress Press, 1991).....5

David Wootton, Introduction, *Political Writings of John Locke*, ed. David Wootton (Mentor, 1993).....8, 27

PRINT MEDIA AND INTERNET SOURCES

Richard T. Cooperman, *Washington Post*, November 22, 2003, A06.....22

Husain Haqqani, "The Limits of Enforced Secular Rule in the Muslim World," *International Herald Tribune*, The IHT Online, November 15, 2002 at http://www.iht.com/articles/76978.html.....26

Susan Jacoby, "One Nation, Under Secularism," *New York Times*, January 8, 2004.....26

John Lichfield, "France's Muslim's Rise above Racial Divide," *The Muslim News*, January 12, 2004, http://www.muslimnews.co.uk/news/news.php?article=6711.....26-27

Thom Shanker, "Generals Words Under Scrutiny," *New York Times*, October 22, 2003, A12.....22

Religious Tolerance.Org, http://www.religioustolerance.org/hinduism1.htm.....25

INTEREST OF *AMICUS CURIAE*[1]

Amicus is a religion scholar and lawyer who has studied, taught, and written about the role of religion in the founding of the United States and about world religions, including the world religions in America. *Amicus* files this brief in support of Respondent because *Amicus* believes that the holding in this case and, in particular, the Court's reasons for its holding, will go to the heart of the foundations of American liberty. Consequently, *Amicus* is participating in this case to counter the erroneous account of the historical context of the Religion Clauses of the First Amendment that is set out in the briefs of the United States and certain *Amici* in support of Petitioner, and which, if followed by this Court, would distort not only history, but ultimately the nation's identity.

Amicus provides the Court with an interpretation of the meaning of religion in the founding of the United States that *Amicus* believes has not been presented to the Court by others. In this regard, *Amicus* maintains that, while there is a religious ground to the nation, it is not the one proffered by the United States and Petitioners' *Amici*, is not represented by the phrase "under God" in the Pledge of Allegiance, and should never be used to justify infringement of the inalienable rights of minorities by the state.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States and certain of Petitioners' *Amici* appeal to this Court to reverse the decision of the court below on the basis that the inclusion of the phrase "under God" in the

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of this brief.

Pledge of Allegiance commemorates the "theistic origin of the American form of government and conception of rights." Rutherford Br. at 2. *Amicus* contends however that, although there is a religious ground to the nation and its conception of rights, the phrase "under God" misrepresents that religious ground, and that a policy requiring teachers to lead students in a Pledge of Allegiance that includes the phrase "under God" fosters the very top-down political structure that the Founders rejected when they established the United States. Moreover, the arguments of the United States and Petitioners' *Amici* in this regard obscure and undermine the fundamental values of the nation, as would reversing the decision of the court below on such bases.

Specifically:

1. The nation is grounded in each individual's relationship with the Divine, which is not in the purview of the government, except to preserve the right. Therefore, ours is not a nation "under God," but rather a nation grounded in individual freedom of conscience.

2. What distinguishes the American system from others is not that it is based on Christianity, the Judeo-Christian tradition, or belief in a Supreme Being, whereas others, such as the former Soviet Union, are secular. What distinguishes the nation is its originally conceived fundamental structure, which provides a free and open forum for a people of free conscience to search for the true and morally good and, in so doing, build the good society from the ground up, rather than having a structure where the state imposes a conception of the good from the top down. The phrase "under God" connotes a top-down structure, and more importantly, it is an endorsement that disrespects the nation's pluralism, and its imposition on school children functionally amounts to top-down coercion.

3. The historical record shows that the shared value and unifying principle of the nation is not "God," but pluralism, which was embraced by the Founders and is the result of adherence to the values of liberty and justice *for all*, which in turn are grounded in the relationship of each individual to the Divine and the search for the true and the good in the free and open forum.

Therefore, *Amicus* respectfully requests this Court to affirm the holding of the court below, acknowledging the above as reasons why Petitioners' public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

ARGUMENT

I. THE AMERICAN POLITICAL SYSTEM HAS A RELIGIOUS GROUND, BUT IT IS NOT THE ONE PROFFERED BY THE UNITED STATES AND CERTAIN OF PETITIONERS' *AMICI*

The United States and certain of Petitioners' *Amici* contend that a reversal of the decision in the court below is warranted in this case because, in part, the phrase "one nation under God" reflects the historical basis on which the nation was founded. *Amicus* submits, however, that the United States and Petitioners' *Amici* have misread history and, therefore, misrepresent the fundamental nature of the American political system. While one might argue that "every ancient and modern civilization up to and including the Seventeenth Century adhered to this basic principle"—that there is "a First Being who brought every existing thing

into being," COLPA Br. at 14,[2] there is a fundamental difference between such systems and that of the United States. And it is this very difference that has been misconstrued in the arguments by the United States and Petitioners' *Amici*.

For example, the Christian Legal Society, et al., (hereafter "CLS") points out that the 83rd Congress (hereafter the "1954 Congress"), in adding "under God" to the Pledge, was "acknowledging a source of authority above government" CLS Br. at 7, and the United States, citing the 1954 Congress with approval, acknowledges the "numerous references to God in historical documents central to the founding and preservation of the United States " US Br. at 36.[3] However, they have wrongly construed the source of that authority and the meaning of those references. Rather, the founders' original conception of the relationship of God to the government of the United States is diametrically opposed to that of "every ancient and modern civilization up to and including the Seventeenth Century." COLPA Br. at 14. And it is this difference that *Amicus* respectfully submits must be unequivocally embraced by this Court or risk undermining the system that permits all of these arguments to be made in the first place.

The United States quotes approvingly the 1954 Congress statement that "Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership." US Br. 36, *quoting* S. Rep. No. 1287, *supra* at n. 3. However, in the American system, it is not

[2] National Jewish Commission of Law and Public Policy, et al. ("COLPA"), quoting Twersky, *A Maimonides Reader* (Behrman House 1972) at 43.

[3] *See* H.R. Rep. No. 1693, 83d Cong. 2d Sess. 2 (1954); S. Rep. No. 1287, 93d Cong. 2d Sess. 2 (1954).

government that should be looking to God for divine leadership; it is the governed.[4] That is, it is up to each individual to look to God for divine leadership, or not.[5] In other words, the assertion that there is a higher authority than government, and that the higher authority is God, misses the critical distinction that should be made between America's political system and all those that preceded it. That critical distinction is that the American political system is based on preserving each individual's relationship with the Divine, however conceived.[6] Therefore, the "higher authority" than government in the American system *is not God, but individual conscience*.

[4] The duty to one's Creator is an individual duty and is the reason for freedom of conscience. "This duty is *precedent* in order of time and degree of obligation, to the claims of Civil Society." James Madison, "Memorial and Remonstrance" (1785), *Madison Writings* at 184-185 (emphasis added).

[5] James Madison, "Memorial and Remonstrance" (1785), *Madison Writings* at 184 (freedom of conscience is private and voluntary). Thomas Jefferson, "To the Danbury Baptists" (1802), *Jefferson Writings* at 281-282 ("religion is a matter which lies solely between man and his God"). In fact, during the founding era the word "religion" meant "personal piety" i.e., faith or belief. It was not until the nineteenth century that the word "religion" came to be used commonly to denote institutionalized religion, as in "the religions." *See RASG* at 185-187, *citing* Wilfred Cantwell Smith, *The Meaning and End of* Religion (1962; Minneapolis; Fortress Press, 1991). The word "religion" in the First Amendment should be interpreted in this light.

[6] The Founders embraced pluralism in recognition of "everyone['s]" "own vine and figtree." George Washington, "To the Hebrew Congregation" (1790), *Washington Papers* at 284-285. *See, infra*, at III.B., regarding the Founders' acceptance of radical pluralism. This was based on the philosophy of John Locke who held that each individual must conduct his own private "search and study" to discover God's inspirations." John Locke, *Letter Concerning Toleration* at 407, and who advocated radical toleration. *See, infra*, at III.B.

Importantly, however the word "God" was understood in the founding era,[7] there was a fundamental assumption about God: God communicates the "natural law" through revelation, insight, and nature, including reason, *to individuals*. Further, the whole concept of liberty was grounded in the idea that God is not coercive; human beings have free will.[8] Thus, while, as CLS Br. at 4-5 has noted, it was understood by the Founders that human beings owe a duty to their Creator,[9] what is missed by the United States and Petitioners' *Amici* is that it was also understood that the only legitimate judge, other than God, as to what constitutes that duty and the natural law is each individual for *him or herself according to conscience*—not the government and not the churches, unless in the latter case a church is voluntarily chosen by the individual as his or her authority.[10] As Thomas Jefferson stated, "The rights of conscience we never submitted, we could not submit. We are answerable for them to God."[11]

Moreover, it was the Founders' clearly expressed view that, through free argument and debate, conscience would be tested and truth would be revealed. As Thomas Jefferson stated: "[S]he [truth] is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by

---

[7] *See infra* at Section III.A., showing that the Founders had a broad conception of the Divine.

[8] This was the state of human beings in the "state of nature." John Locke, *Second Treatise* at 338-485. The founding era abounds with references to John Locke, the state of nature, and the social compact. *See, e.g.*, Samuel Adams, "Rights of the Colonists" (1772), *Documentary History* at 200-211.

[9] James Madison, "Memorial and Remonstrance" (1785), *Madison Writings* at 184-185.

[10] Regarding the views on this of John Locke, *see RASG* at 34-37, and of the Founders, *see RASG* at 88–91. *Cf.* Thomas Jefferson, "A Bill for Establishing Religious Freedom" (1779), *The Complete Jefferson* at 946.

[11] "Notes on the State of Virginia" (1782), *The Complete Jefferson*.

human interposition [she is] disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."[12] In this way, it was thought, the good society could be built by the people from the ground up.

This is a completely different system and conception of the relationship of the Divine to government than what preceded it. In previous "ancient and modern" systems, the idea was that the relationship of the Divine was not with individuals—the people—but with those at the top, the ruling elite, whose duty it was to discern the Divine will or order and then impose it on the people from the top down. These were governments with top-down overarching worldviews, involving a unified vision of the ways in which the divine order should be reflected in the moral order. An example is classical Hinduism, which generated the caste system as an expression of *dharma* (the moral order) as a reflection of *rita* (the divine order).[13] Similarly, this was the approach of other religio-political systems that combined a particular religious doctrine with the force of law from top to bottom, for example, medieval Catholicism and the Holy Roman Empire, the Church of England and the seventeenth century British Crown (which John Locke opposed), Neo-Confucianism and the eleventh and twelfth century Song Dynasty in China, and, today, Islam and Saudi Arabia.

It was this top-down overarching worldview system, involving Christianity and the state, that was opposed by the Founders and John Locke before them. That political system was based on traditional Christian political theory, which held that government was necessary in order to restrain the

---

[12] Thomas Jefferson, "A Bill for Establishing Religious Freedom" (1779), *The Complete Jefferson at* 947.

[13] *MPMF* at 55.

sinful nature of human beings. This approach required the state and the prevailing religion to be close allies. [14]

But Locke, and the Founders following him, rejected the idea that the role of government was to restrain the sinful nature of human beings.[15] Rather than religion informing the structure of society from the lofty reaches of the top of the governing structures down to the masses as an overarching worldview to live by, as had been the traditional approach, under the American system religion is to effect society from the ground up, as individuals of conscience freely express themselves in a free and open forum from the perspective conscience gives them. This is what distinguishes the religious ground of the American political system and the religious framework of the political systems that preceded them—and this is an important distinction, one that America must acknowledge and embrace or risk returning to the top-down systems that the Founders expressly rejected.

Yet the United States and Petitioners' *Amici* have not grasped that distinction. So when they read the Founders' references to Divine Providence and the like in the historical record, they misconstrue the place of the Divine in the American system. The result is muddled reasoning. For example, the Liberty Counsel, *et al.*, (hereafter "Liberty") Brief argues that without recognition of the Divine origin of the inalienable rights, "there is no foundation" for them. Liberty warns, therefore, that without such recognition "the government or this Court can take them away." Liberty Br. at 2. Yet Liberty contends that a top-down state policy that contravenes those rights is warranted because those rights have Divine origin. Such reasoning is circular, saying in

[14] *See* David Wootton, Introduction, *Political Writings of John Locke*, ed. David Wootton (Mentor, 1993) at 65.
[15] *Id.*

effect: Our rights have Divine origin and so cannot be infringed; therefore this Court should use a Divine origin justification to infringe those rights.

Rather, while it may be said that the "Founders believed that the authority of government must be limited with respect to certain inalienable rights" and that those inalienable rights were understood by the Founders to have Divine origin, CLS Br. at 4, it does not follow that the phrase "under God" should be endorsed by the government and coercively imposed on school children by the state from the top down in a Pledge of Allegiance.[16] Only flawed logic would make it so.

II. A FALSE RELIGIOUS/SECULAR DICHOTOMY IN THE BRIEFS OF THE UNITED STATES AND PETITIONERS' *AMICI* OBSCURES WHAT THE FOUNDERS REJECTED—TOP-DOWN GOVERNMENT DOMINATION

Much has been made by the United States and Petitioner's *Amici* of the reasons for the 1954 Congress's insertion of "under God" in the Pledge—the primary one being to counter the "spiritual bankruptcy" of the antireligious stance of the Communist Soviet Union. US Br. 36. *See also* CLS Br. 6-7. However, what distinguished the Soviet Union's approach to government from America's was not that America was religiously grounded and the Soviet Union was hostile to religion. What distinguished the Soviet Union from America was that the Soviet Union was based on a top-down overarching worldview (Marxism) and America was

[16] On the coerciveness of the phrase "under God" in the Pledge, *see generally* Religious Scholars and Theologians (hereafter "Religion Scholars") Brief at 15-30; Americans United for Separation of Church and State, *et al.*, (hereafter "Americans United") Brief at 9-26; Clergy and Religious Organizations (hereafter "Clergy") Brief at 8-15.

not. In other words, the distinction did not involve a religious vs. secular dichotomy. Rather, it involved a top-down vs. ground-up dichotomy; that is, it involved a governmental domination vs. individual liberties dichotomy.[17] This distinction has also been overlooked.

In other words, the preservation of the American system depends not so much on whether or not the government is religious or secular as it does on whether the government uses its religion or secularity to dominate the people by undermining individual liberties. That is, it is the dominating effects of government, whether they are religious or secular, that must be curtailed, so as to preserve the sacred ground of individual liberties that underlies the nation.[18]

The 1954 Congress's failure to grasp this distinction when it added the words "under God" to the Pledge led members of that Congress to argue such things as that Congress's goal was to use the "strongest weapon," which was said to be the "spiritual bankruptcy of the Communists," as its means "in the struggle for men's minds," US Br. at 36-37, *quoting* S. Rep. No. 1287, *supra*, at n. 3. This is an anathema. The government should not be involved in "the struggle for men's minds" in such matters. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . . .")

---

[17] For more on the distinction between the two, *see RASG* at 39-40, 91-93.

[18] Apparently, this distinction was understood before 1954 when flag rituals were designed to affirm "the values of 'liberty and justice' that distinguished the United States from its wartime enemies—who themselves employed slogans . . . [invoking God] to rally citizens behind their war efforts." Religious Scholars Br. at 9-10.

Rather, the American system is fundamentally based on the idea that such things should be left to the free forum—where truth can shift for herself. As John Locke said:

> For truth certainly would do well enough, if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known, and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succours, but if truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.[19]

John Locke held, and the Founders agreed, that the government's involvement in the "struggle for men's minds" is not an effective means to truth.[20] Consequently, the conscience of a free people is the only hope—only then does truth have a real chance to prevail. More succinctly, the 1954 Congress would have acted more appropriately if it had added the words "grounded in individual conscience" to the Pledge rather than "under God." This would have been a more accurate acknowledgment of the religious ground of the founding of the nation and a more effective counter to Soviet totalitarianism.

Further, the United States argues that "[t]he Framers also incorporated in the governmental design aspects of Puritan

---

[19] John Locke, *A Letter Concerning Toleration* at 420-421.

[20] *See* Thomas Jefferson, "A Bill for Establishing Religious Freedom" (1779), *The Complete Jefferson* at 947 ; "Notes on the State of Virginia" (1781-1785), *The Complete Jefferson* at QXVII. 675.

covenant theology." US Br. at 23. But this is extremely misleading. It was the very aspects of Puritan covenant theology that placed God above the state that constituted, in effect, the top-down system that the Founders roundly rejected when they invoked religion to justify individual conscience as the mediator of the Divine in society—*rather than the state*.[21] If this Court were to adopt the United States' interpretation of the Founders' references to religion, instead of those set out herein, this Court would be returning the nation to the bases for the political system *that the Founders repudiated*.

Thus, it is wholly erroneous to frame the debate in the instant case in terms of God on one side and atheistic secularism on the other, as the United States and Petitioners' *Amici* have done. Religion is on both sides of the debate. The difference is the role it plays in each—promoting religion or promoting individual conscience. In other words, ours is not a nation "under" God *or* secularism; it is a nation *grounded* in the individual's relationship with the Divine (however conceived by conscience).[22]

Therefore, it is not Christianity or the Judeo-Christian tradition that sets America apart from secularized states such as the former Soviet Union. This is abundantly clear when we recognize that Christianity (as well as, of course, monotheism) is not monolithic, as the United States and Petitioners' *Amici* seem to believe. While certainly there are Christianities whose theologies have aspects that are

---

[21] *See* Religious Scholars Br. at 19.

[22] It should also be noted that "[t]he acknowledgment that America has a "civil religion" should not be construed so as to support arguments to this Court that the government should be authorized to impose anyone's conception of it. That includes any mention [of religion] in the Pledge." Phillip E. Hammond, co-author, with Robert N. Bellah, of *Varieties of Civil Religion* (HarperCollins, 1982) in an email exchange with *Amicus*, dated February 6, 2004. Quoted with permission.

consistent with the religious ground of our nation, there are many Christianities that would not support America's ground-up political system; *history is replete with examples*.[23] (As Benjamin Franklin said, "If we look back into history for the character of present sections in Christianity, we shall find few that have not in their turns been persecutors, and complainers of persecution."[24]) What sets America apart is that, unlike political systems based on top-down overarching worldviews, ours is a nation that is in the process of realizing the ideal that all of humanity can live together peaceably in America on our sacred ground where individual freedom of conscience and its expression, and the other inalienable rights, are guaranteed—where "everyone shall sit in safety under his own vine and figtree, and there shall be none to make him afraid."[25]

III. THE FOUNDERS EMBRACED PLURALISM, WHICH IS THE SHARED VALUE AND UNIFYING PRINCIPLE OF THE NATION

Of course, it is clear that the Founders (and John Locke before them) held that our inalienable rights have a Divine origin. That is, they are rights that cannot be bargained away by the people in a social contract—because they are part of us as human beings. Therefore, the inalienable rights never

---

[23] *See, e.g.*, those listed *supra* at 7. Note also, not all Christianities hold that human beings have free will or that the relationship of the Divine is with individuals, rather than the state. Moreover, an argument can be made that other religions support the fundamentals underlying the American system. *Cf.* Neilia Beth Scoville, *The Liberation of Women: Religious Sources* (Washington, DC: The Religious Consultation on Population, Reproductive Health and Ethics, 1995)(identifying the "egalitarian core" in major world religions).

[24] Benjamin Franklin, "Toleration in Old and New England" (1772), *Franklin Writings* at 673.

[25] George Washington, "Letter to the Hebrew Congregation" (1790), *Washington Papers* at vol. 6, 284-285.

are infringed legitimately by the state. But it does not follow from this that the founders intended anyone's particular conception of the Divine to frame those rights, as was the intention of the 1954 Congress when it added the phrase "under God" to the Pledge of Allegiance, a view supported by the United States, Petitioners, and their *Amici* in the instant case.[26] In fact, *Amicus* submits, the Founders' intentions were to guarantee freedom of conscience for individuals of a present and future pluralistic society.

A. The Breadth of the Words Used by the Founders to Reference the Divine Implies Inclusiveness

Petitioners' *Amici* would have this Court believe that the Divine referent of the Founders was "God." However, it is reasonable to conclude that the Founders intended the political system to be very inclusive of many different conceptions of the Divine. The American Founders had various ways of referring to the Divine, including such names as "Supreme Governor of the Universe," "Governor of the Universe," and "the Universal Sovereign."[27] The Declaration of Independence uses the phrase "Nature's God," which should be read as meaning "the God of Reason."[28] In addition to that phrase, it uses the terms "Creator," "Supreme Judge of the world," and "Divine Providence." However, the Founders did not specify what

---

[26] Regarding the sectarian understanding of the words "under God" in the Pledge during the 1954 Congress, *see* Religious Scholars Br. at 3-4, 10-12. *See also* Americans United Br. at 25.

[27] *See, e.g.*, James Madison, "A Memorial and Remonstrance," *Madison Writings* at 185.

[28] *See* John Locke, *Essay on Human Understanding*, *The Works of John Locke*, 9 vols., vol. II . Book IV. Ch. XIX, ¶ 4 at 273 ("Reason is natural revelation whereby the eternal Father of light and fountain of all knowledge communicates to mankind that portion of truth which He has laid within the reach of their natural faculties . . ."). *See also* John Locke, *Second Treatise*, at 438-439, equating nature and reason.

was meant by any of these references in their political writings. One might reasonably conclude therefore, based on the breadth of the terms used and the Founders' rejection of top-down Puritan covenant theology, from which these sorts of references originally derived,[29] and the fact that the Constitution does not make reference to the Divine at all, that the Founders meant to convey a message of inclusiveness of more than a particularized conception of "God," and even beyond the conception of God as necessarily having to be *a* God.[30]

The most that can be said is that whomever or whatever the Founders meant by use of the word "God" or their other names for the Divine, their understanding was that it created the world and is capable of communicating truth and the good to individual human beings. That is, it in some way provides human beings with conscience. However, belief in a personal God, a Supreme Being, or any other particular conception of God was not required to be a patriotic American of the United States.[31] Thus, whether or not the Founders identified as being Christian,[32] the Founders sought

---

[29] *See supra* at 11-12.

[30] "[I]t does me no injury for my neighbor to say there are twenty gods or no God." Thomas Jefferson, "Notes on the State of Virginia" (1782), *The Complete Jefferson*. "At one point [Benjamin Franklin] expressed a belief in a single supreme God who supervised a number of lesser gods, one of whom had created our world; and he dreamed up an elaborate ritual for a private deistic religious service of his own to take the place of what went on in churches." Edmund S. Morgan, *Benjamin Franklin* (Yale University Press, 2002) at 19. *But see* Benjamin Franklin, "To Ezra Stiles" (1790), *Franklin Writings* at 1179, wherein he professed a belief in one God. However, he also said: "Morality or Virtue is the End, Faith only a Means to obtain that End: And if the End be obtained, it is no matter by what means." Benjamin Franklin, "Dialogue Between Two Presbyterians" (1735), *Franklin Writings* at 257.

[31] *See generally* Legal and Religious Historians and Law Scholars Brief.

[32] *See* n. 30 *supra*. *See also RASG* at 72, which argues that, while the Founders generally held to the view that the Divine is active in history in

to be much more inclusive than is acknowledged by the word "God," knowingly framing a Constitution that would permit "Jews Turks & infidels"[33] and "Pagans, Deists, and Mahometans,"[34] to be President of the United States.

B. The Historical Record Shows that the Founders and John Locke Before Them Embraced Pluralism[35]

The inclusiveness of the founding generation goes back to John Locke, on whom the Founders largely relied, and his conception of tolerance. Locke, a High Church Anglican writing in 1685 against the orthodoxy of his own church, promoted tolerance of religious people of all sorts, including those in all sects of Protestant Christianity (naming the most controversial of his day),[36] Catholics,[37] Jews,[38] Muslims or "Mahometans,"[39] Native Americans,[40] and pagans.[41]

> [I]f solemn assemblies, observations of festivals, public worship be permitted to any one sort of professors [i.e., religious people], all these things ought to be permitted to the Presbyterians,

some way, many adhered to "rational religion," which was not necessarily or generally coextensive with Christianity.

[33] Madison, in a letter to Jefferson noted that "[o]ne of the objections [to the United States Constitution] in New England was that the Constitution, by prohibiting religious tests, opened a door for Jews Turks & infidels." James Madison, "To Thomas Jefferson" (1788), *Madison Writings*, at vol. 5, 272.

[34] Elliot Debates vol. 4, 191-192 (comments of Henry Abbot).

[35] *See generally RASG* at 27-29, 82-87, 94-95.

[36] John Locke, *Letter Concerning Toleration* at 431.

[37] *Id.* at 420.

[38] *Id.* at 412, 420, 431.

[39] *Id.* at 431.

[40] *Id.* at 416.

[41] *Id.* at 400, 417, 431.

> Independents, Anabaptists, Arminians, Quakers, and others, with the same liberty. Nay, if we may openly speak the truth, and as becomes one man to another, neither pagan, nor Mahometan, nor Jew ought to be excluded from the civil rights of the commonwealth because of his religion.[42]

Locke advised that even "idolatry, superstition, and heresy" and "heathens" should be tolerated.[43]

Although Locke sought to extend religious tolerance to even "heretics" and "heathens," he expressly excluded, however, those "who deny the being of God" from such right. He argued that they ought "not at all to be tolerated" because the denial of God threatens the "[p]romises, covenants, and oaths, which are the bonds of human society" and "undermine[s] and destroy[s] all religion" and so "can have no pretence of religion whereupon to challenge the privilege of toleration."[44] But the founders went much further than Locke in these regards, extending freedom of conscience to atheists and others for whom the word "God" does not adequately represent their concept of the Divine. As Jefferson wrote:

> Locke denies tolerance to those who entertain opinions contrary to those moral rules necessary for the preservation of society, as for instance, . . . [those] who deny the existence of a god (it was a great thing to go so far—as he himself says of the parliament which framed the act of toleration—but where he stopped short we may go on).[45]

[42] *Id.* at 431.

[43] *Id.* at 402, 420.

[44] *Id.* at 426.

[45] Thomas Jefferson, "Notes on Religion" (1776), *The Complete Jefferson* at 945.

Although there were dissenters, of course, the breadth of the rights being guaranteed and the acknowledgment of America's then existing and future pluralism prevailed in the founding era. For example, Richard Henry Lee wrote to Madison: "I fully agree with the Presbyterians, that true freedom embraces the Mahomitan [Moslem] and the Gentoo [Hindu] as well as the Christian religion."[46] And Jefferson's "Notes on Religion" echoed Locke when they stated:

> He [Locke] says 'neither Pagan nor Mahomedan nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion.' Shall we suffer a Pagan to deal with us and not suffer him to pray to his god ?. . . . It is the refusing toleration to those of different opinion which has produced all the bustles and wars on account of religion.[47]

And regarding the debate about the Virginia Act for Religious Freedom, Jefferson said: "[T]he insertion [of Jesus Christ in the preamble] was rejected by the great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohammendan, the Hindoo and Infidel of every denomination."[48]

George Washington expressed this most eloquently during the time that state ratification of the federal Bill of Rights was in process. In his "Letter to the Hebrew Congregation in Newport, Rhode Island" (August 18, 1790), Washington clearly acknowledged the obviously widely held

---

[46] Richard Henry Lee, "To James Madison," (1784), *Madison Papers*, at vol. I, 173-75.

[47] Thomas Jefferson, "Notes on Religion," *The Complete Jefferson* at 945.

[48] Thomas Jefferson, *Autobiography*, 1821, *The Complete Jefferson*.

view that no longer was the concept mere "toleration," but the Bill of Rights guaranteed freedom of conscience for all:

> All possess alike liberty of conscience, and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent national right. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support . . . .[49]

Even more telling, however, is Richard Henry Lee's 1787 argument in favor of the adoption of a bill of rights that included the right to free conscience, wherein he acknowledged a pluralistic future America: "It is true, we are not disposed to differ much, at present, about religion; but when we are making a constitution, it is to be hoped, for ages and millions yet unborn . . . ."[50] In other words, contrary to the impression generally given about the founding era in church/state debates today, expansion of American pluralism well beyond Christianity and Judaism was contemplated and, even though there were dissenters, pluralism was embraced in the founding era.

Thus, even at a time when the Founders had not given effect to the full import of the Bill of Rights in the legal system they had established, in that they failed to abolish slavery and did not accord women equal rights among other things, the Founders nevertheless embraced pluralism, expressly acknowledging that the United States could

---

[49] George Washington, "To the Hebrew Congregation" (1790), *Washington Papers* at 284-285.

[50] Richard Henry Lee, "Observations of Government" (1777), at 28.

include many peoples of many different faiths—some vastly different than those found in the familiar cultures of the West, and including individuals, such as Respondent, who deny the existence of a God.

C. The Majoritarianism of the United States and Petitioners' *Amici* is in Opposition to the Intentions of the Founders

The foregoing makes it abundantly clear that certain *Amici's* arguments that the religion of today's majority should hold sway by being recognized in the wording of the Pledge should be roundly rejected by this Court, for as all Americans should know, the Bill of Rights was expressly adopted as a bulwark against the majority for the preservation of minorities' inalienable rights. *See, e.g.*, COLPA Br. at 15 (referencing an "overwhelming majority" as a reason to ignore minorities) and Pet. Br. at 42 (reminding this Court of the "national uproar caused by the Ninth Circuit's decision in the instant case"). As James Madison warned in his speech to the First Congress wherein he proposed the Bill of Rights (June 8, 1789):

> The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But it is not found in either the executive or legislative departments of Government, but in the body of the people operating as a majority against the minority.[51]

A Bill of Rights, he told Thomas Jefferson, is no barrier to infringement of the natural rights of individuals when the

[51] James Madison, "Speeches in the First Congress, First Session," 8 June 1789, *Madison Writings* at vol. 5, 382.

majority is bent on action that violates its proscriptions.[52] Further, Madison expressed grave concern that religion "kindled to enthusiasm" was especially prone to override the free consciences of individuals.[53]

Yet the United States and Petitioners' *Amici* seem to have forgotten the Founders' conviction that freedom of conscience is an inalienable right of all. In fact, the majoritarianism in the briefs of the United States and the Petitioners *Amici* is remarkable. For example, the United States references "all students" and then only acknowledges "Jewish, Christian, Muslim, or atheists," US Br. 48, obviously overlooking the vast pluralism of today's American religious landscape, thus marginalizing many Americans. In another example, the brief of COLPA, holds that "civilization cannot exist without the acknowledgment of God." COLPA Br. at 8. The implication is that peoples who do not acknowledge "God" are uncivilized, which would include Confucianists, Theravada Buddhists, certain Daoists and Hindus, as well as others. But such majoritarianism does not stop there, as *Amicus* shows below.

D. The Word "God" is Not Generic and Is Not a Shared Value or Unifying Concept

The majoritarianism of the United States and Petitioners' *Amici* has led them to the erroneous assertion that the phrase

[52] James Madison, "To Thomas Jefferson" (1788), *Madison Writings* at vol. 5, 272-273.

[53] In this regard, in discussing the pending Bill of Rights, he wrote to Thomas Jefferson: "The conduct of every popular Assembly, acting on oath, the strongest of religious ties, shews that individuals join without remorse in acts agst. which their consciences would revolt, if proposed to them separately in their closets. When Indeed Religion is kindled into enthusiasm, its force like that of other passions is increased by the sympathy of a multitude." James Madison, "To Thomas Jefferson," 24 October 1787, *Madison Writings*, vol. 5, 30-31.

"under God" in the Pledge acknowledges a shared value and/or that it promotes national unity. *See, e.g.*, US Br. at 35, 38; COLPA Br. at 5-6. Nothing could be further from the truth. First, the word "God" is not a value. A reference to "God" without more says nothing about what is valued.[54] Second, "God" is not a unifying concept and is not shared. Today's Christians do not even agree as to what "God" refers. President Bush recently discovered this when he stated that he believes Christians and Muslims worship the same God, and then was roundly criticized by several leading Christians.[55] Considering that Muslims, Christians, and Jews have a shared history as a "family" of faiths in that "[t]he God of Judaism, Christianity, and Islam is the God of Abraham, Moses, and the prophets," *MPMF* at 252, this response is disturbing. One can only imagine what the reaction would have been if President Bush had stated that

[54] *Cf.*, Matthew 7: 20-21, *New International Version* ("Wherefore by their fruits ye shall know them. Not everyone who says to me, 'Lord, Lord,' will enter the kingdom of heaven, but only he who does the will of my Father.")

[55] *See* Richard T. Cooperman, *Washington Post*, November 22, 2003, at A06. In response to President Bush's statement that Muslims and Christians worship the same God, "Richard D. Land, president of the public policy arm of the Southern Baptist Convention, the nation's largest Protestant denomination," was quoted by a "Baptist press report" "as saying that Bush 'is simply mistaken.'" *Id.* Reportedly, Richard D. Land went on to say, "The Bible is clear on this: The one and true god is Jehovah, and his only begotten son is Jesus Christ." *Id.* Similarly, "Rev. Ted Haggard, president of the National Association of Evangelicals," was quoted as saying that the Christian God and the Islamic God "seem to be very different personalities." Id. Responding that he did not think it would cost the President the support of evangelical Christians, Richard D. Land stated that, after all, President Bush had not said "that Islam is on a par with Christianity." That, Land said, "would be a more serious case of heartburn." *Id.* Also, it was widely reported that General Boykin said, "I knew my God [the Christian God] was bigger than his [the Muslim God]. I knew that my God was real and his was an idol." Thom Shanker, General's Words Under Scutiny, New York Times, October 22, 2003, A12.

he believed adherents of Zoroastrianism and Sikhism (also monotheistic religions) or bhaktic Hinduism and Amidist Buddhism (which can in some sense be considered monotheistic), *Id.*, also worship the same God as do Christians. Clearly, "God" is not a unifying shared value.

Yet The Claremont Institute Center for Constitutional Jurisprudence (hereafter "Claremont") argues that recitation of "under God" as a part of the Pledge of Allegiance is necessary to "inculcate virtue in the citizenry," presuming therefore that the virtues necessary for American citizenship cannot be inculcated by religious or secular sources for whom the word "God" is not apt. Claremont Br. at 11-13. Moreover, Claremont is arguing, in effect, that American virtue is linked necessarily to monotheism. *Id.* That is, according to Claremont's logic, in order to give full effect to the Establishment Clause of the First Amendment, an establishment of the religion of monotheism is necessary to fulfill the Founders' intentions of promoting virtue.[56] This is the sort of skewed reasoning that results from the failure to recognize that the Founders' intention was to preserve the relationship of the Divine (however conceived by conscience) with *individuals* and not the state.

Claremont, other Petitioners' *Amici*, and the United States have adopted, in effect, the syllogism James T. Hutson contends reflects the thinking of the founding generation: "virtue and morality are necessary for free, republican government; religion is necessary for virtue and morality; religion is, therefore, necessary for republican government."[57] In the instant case, however, "religion" is replaced with "monotheistic religion." Nevertheless,

[56] On how the Petitioners' school policy is an "establishment," *see, e.g.*, Americans United Br. at 9-16; Clergy Br. at 3-7.

[57] James H. Hutson, *Religion and the Founding of the American Republic* (Library of Congress, 1998) at 81.

Hutson's logic is short one step. To comport with the Founders' view of the relationship of religion and morality to republican government, the logic would have to be: virtue and morality are necessary for free, republican government; religion is necessary for virtue and morality; freedom of conscience is necessary for religion to reflect true virtue and morality; freedom of conscience, therefore, is necessary for republican government. *RASG* at 147. Moreover, the Founders believed that little was more corrupting than the commingling of state and church.[58] Clearly, Claremont and other *Amici* have misconstrued the place of virtue in the American system.

E. Pluralism Is America's Shared Value Which, Unlike "Under God," is Consistent with the Moral Foundations of the Nation

America's shared value and unifying concept is pluralism itself. *See County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989)(O'Connor, J., concurring)(indicating that pluralism is a message of value); *see* also *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)(O'Connor, J., concurring)("Endorsement sends a message . . . to adherents that they are insiders, favored members of the political community."—This acknowledges, in effect, the importance of respecting pluralism.) And it is pluralism that would be embraced if this Court were to affirm the holding of the court below.

It is important to point out that pluralism does not equate to moral relativism, as certain of Petitioners' *Amici* have

---

[58] On this they relied on Locke and their own immediate history. *See* Locke, *Letter Concerning Toleration* at 417: "[I]t appears what zeal for the Church, joined with the desire of dominion, is capable to produce: and how easily the pretence of religion, and of the care of souls, serves for a cloak to covetousness, rapine, and ambition." *See also* n. 65 *infra*.

implied,[59] and some in the popular discourse of the nation believe.[60] In fact, the valuing of pluralism *requires* a moral foundation, the moral foundation that holds that it is *good* to welcome all religio-cultural expressions in the free and open public forum, where "truth can shift for herself"—the moral foundation that upholds liberty and justice *for all*, and makes it possible for the people to build the good society from the ground up.[61]

In other words, a moral foundation that embraces pluralism is consistent with the American system established by the Founders. This is a foundation that holds that the state may not sanction the infringement of the inalienable rights of its minorities, even in the face of a powerful and vocal majority (which relates to liberty), and it is a foundation that holds that no one may deny to others, through the instrumentalities of the state, what one is not willing to deny oneself (which relates to justice). *Cf. RASG*

---

[59] *See, e.g.*, Claremont Br. 11-13.

[60] *See e.g.*, "Many people today confuse traditional Western religious tolerance with religious pluralism. The former embraces biblical truth while allowing for freedom of conscience, while the latter assumes all religious are equally valid, resulting in moral relativism and ethical chaos." Robert E. Regier and Timothy J. Dailey, essay published on the Family Research Council's web site and weekly newsletter, after a Hindu priest gave the opening prayer in Congress. Quoted by Religious Tolerance.Org at http://www.religioustolerance.org/hinduism1.htm.

[61] "[F]reedom of conscience was not preserved as a kind of benign right for the private benefit of individual people. Rather, the expression of the free consciences of the people in the Public Forum was deemed to be central to the entire American enterprise because it was to be not only an end for individuals, but the means to a good society. That is, while freedom of conscience is private and voluntary (Madison) and thus "solely between man and his God" (Jefferson), freedom's function is to promote the public, as well as the private, good." *RASG* at 106 (citing James Madison, "Memorial and Remonstrance" (1785), *Madison Writings* at 184 and Thomas Jefferson, "To the Danbury Baptists," *Jefferson Writings* at 281-282.

at 94-99. Yet the United States, Petitioners, and their *Amici* wish to deny to America's minority faiths what they are not willing to deny themselves—full rights of conscience.[62]

Moreover, if this Court were to hold that the words "under God" in the Pledge make the school policy at issue in the instant case unconstitutional, doing so would not "show a callous indifference to religion." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), as certain of Petitioners' *Amici* contend. A nation that embraces pluralism, by among other things acknowledging and sustaining its minority faiths, is not an irreligious nation. It is *not* a nation under secularism.[63] It is a nation that embraces religion—all religion—as well as irreligion. Strictly secularized nations, such as the former Soviet Union or present-day Turkey, prohibit religious practices and limit the ability for religious people to participate in public life.[64] These are top-down

---

[62] For example, COLPA, argues that affirming the decision of the court below "would not be a neutral act . . . . It would be read by the citizenry of this nation . . . as a blow to those who do believe in God and view their country as 'one nation under God.'" COLPA Br. at 16-17. In other words, according to COLPA, the phrase "under God" is not neutral. In light of the principles outlined in the accompanying text, however, it is only if including or not including the phrase *were* neutral that it could be promoted by the state, which, of course, COLPA, is correct in arguing that it is not.

[63] *See* Susan Jacoby, "One Nation, Under Secularism," *New York Times*, January 8, 2004, arguing that the nation should be "under secularism."

[64] *See* Husain Haqqani, "The Limits of Enforced Secular Rule in the Muslim World," *International Herald Tribune*, The IHT Online, November 15, 2002 at http://www.iht.com/articles/76978.html ("[S]ecularism in [Turkey is] an anti-religious ideology rather than a political system ensuring separation of church and state." "[A] Muslim schoolgirl in the United States . . . can wear a head scarf to school if she so desires. But a schoolgirl in . . . Turkey is legally forbidden to do so.") *Cf.* John Lichfield, "France's Muslim's Rise above Racial Divide," The Muslim News, January 12, 2004 ("President Chirac called last month for a new law to ban the wearing of Muslim headscarves, and other overt

political systems that are readily distinguishable from America's pluralistic ideal, which does neither. Yet the United States, Petitioners, and their *Amici* argue in favor of the Pledge of the 1954 Congress, which has marginalized those in the many faiths that make up America's pluralistic society, violates the nation's principles of liberty and justice, and therefore undermines the foundations of the nation by promoting a top-down imposed "unity" reminiscent of the very political systems Locke and the Founders opposed.[65]

The Declaration of Independence states that our rights derive from our Creator, and that those rights are inalienable—that is, they are part of who we are as human beings and, therefore, *never* are abridged legitimately by the state. But what the United States, Petitioners, and their *Amici* fail to understand is that a government policy endorsing "God" in the Pledge in the coercive environment of the public school system results in the very thing that the Founders sought to avoid—the infringement by the government of those inalienable rights.

---

religious symbols, in state schools and offices.") at http://www.muslimnews.co.uk/news/news.php?article=6711.

[65] On uniformity, *see* Thomas Jefferson, "Notes on the State of Virginia" (1781-1785), *The Complete Jefferson* at Q. 17: "Is uniformity attainable? Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. What has been the effects of coercion? To make one half of the world fools, and the other half hypocrites." *See RASG* at 43: "In answer to those who claimed that religious uniformity and punishment against those who deviate from it are necessary to maintain the public order, Locke argued that enforced uniformity *is contrary to peace*. All attempts to enforce uniformity have resulted not in a peaceful and orderly society, but in fractionalized interests and armed disputes . . . ." *See also* David Wootton, Introduction, *Political Writings of John Locke* at 39.

CONCLUSION

The peoples of our nation are not united in their understanding of the meaning of the word "God" or even in their understanding of what it would mean for this Court to reverse the Ninth Circuit's decision.[66] In fact, contemporary arguments about the meaning of the word "God" are rife with particularized religious content. In such an environment, this Court should not sanction a Pledge of Allegiance that separates Americans into the preferred and the marginalized. That is, the reversal of the holding of the court below would continue to divide the nation's school children into what *Amicus* has referred to elsewhere as the "accepted diversity" and the "excepted diversity." *RASG* at 159-160.

Accordingly, this Court should *not* make a "constitutional distinction between establishment of religion and public recognition of the providence of God in the context of the uniquely American notion of government institutions and the conception of divinely bestowed universal human rights . . . ." in its holding in this case, as The Rutherford Institute has urged. Rutherford at 13. To do so would misconstrue the historical context of the Religion Clauses and the intentions of the Founders. Moreover, as Respondent and his other *Amici* have made clear, this Court cannot make such a distinction without establishing religion.

---

[66] *See, e.g.*, CLS Br. at 3-4 ("the phrase 'under God' is 'normative'"); US Br. at 40 (arguing that the Pledge overall is not normative, but descriptive); CLS Br. at 1 (the phrase "under God" is "neutral"); COLPA Br. at 16-17 (the phrase "under God" is not neutral); Rutherford Br. at 9 (the phrase "is undeniably religious in nature"); US Br. at 32-33 (the phrase is merely an acknowledgment of the nation's history and is not inherently religious); Pet. Br. at 30-31 (reciting the Pledge does not amount to a religious act).

Rather, *Amicus* respectfully requests this Court to acknowledge the nation's shared value of pluralism and the accurate religious ground of the nation (one that opposes top-down religious and secular political systems), as *the reasons why* Petitioners' public school policy is unconstitutional, while making it clear that the religious ground of the nation should never be used to justify the state's infringement of the rights of minorities.[67] In other words, it is *because* ours is a nation of *individuals* under God, or more accurately, it is because ours is a nation *grounded* in each individual's relationship with the Divine (however conceived by conscience), that a policy requiring teachers to lead school children in the recitation of a Pledge of Allegiance, which includes the words "under God," is unconstitutional.

> So as we dig deeply to find the roots of our identity—what it is that joins all of the multifarious beauty of the diversity of our people and the plurality of our beliefs—we discover that our identity is not found in a vision of the many made one. We are not a people with one appearance, one history, one culture, one

---

[67] *Amicus*' position here comports with the argument in the CLS Brief that government may make expressions that are not neutral at the "justificatory level," although *Amicus* takes the position, contrary to CLS's conclusions, that the Petitioners' school policy functions at the "operational level." *See* CLS Br. at 7-8., quoting Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 730 (1997). Moreover, as argued herein , the phrase "under God" is not, in any event, an accurate statement of the nation's "underlying principles." As a result, the phrase does *not* represent "the foundation upon which rests the requirement that the government must in all other respects be neutral toward religion," as CLS contends. *See* CLS Br. at 9. Thus, while it can be said that "[f]reedom of conscience and the importance of uncoerced religious belief are fundamentally religious propositions," that are properly invoked by the Court, CLS Br. at 10, citing Michael W. McConnell, *Why is Religious Liberty, the "First Freedom"*? 21 Cardozo L. Rev. 1243 (2000), it does not follow that it is constitutional to infringe freedom of conscience by invoking those propositions.

religion. Ours is a people that is much more beautiful because we are not defined by ethnicity, national origin, common perspective, appearance, or anything else like that. We are defined by a vision of the many as one, all standing on America's Sacred Ground—all striving in a free and open forum . . ., where truth can "shift for herself," for what we believe will make a better world.[68]

Respectfully Submitted,

Barbara A. McGraw
Associate Professor
Saint Mary's College of
California
1928 Saint Mary's Road
Moraga, California 94556-4230

February 13, 2004

---

[68] *RASG* at 184.

Appendix: Qualifications and Affiliations of *Amicus*

Barbara A. McGraw is author of *Rediscovering America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America* (State University of New York Press, 2003), from which the argument in this brief is primarily derived, and, with co-author Robert S. Ellwood, *Many Peoples, Many Faiths: Women and Men in the World Religions* (several editions, 1999-). *Amicus* is also Associate Professor, Saint Mary's College of California; graduate of the University of Southern California: J.D. 1984 and Ph.D. (Religion and Social Ethics) 1999; and a Past President of the American Academy of Religion/Western Region.